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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

v.

State Board of Education of North Carolina; Charles F. Carroll, etc.; Winston-Salem/Forsyth County Board of Education; Board of County Commissioners of Forsyth County; and City of Winston-Salem, North Carolina,

Respondents

RESPONSE OF FORSYTH COUNTY, NORTH CAROLINA, BOARD OF COMMISSIONERS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUBJECT INDEX

	Pages
Introduction	1
Question Presented for Review	3
Statement of Case	7
Argument	10
Summary	23

TABLE OF CASES AND STATUTES

CASES	Pages
Allen, Harvey H. and Simona A. v. State Board of Education of North Carolina, et al., 447 F. 2d 960 (No. 71-1563, 4th Cir. 1971)	2, 9 21, 22
Atkins v. McAden, 229 N. C. 752, 51 S. E. 2d 484 (1949)	15, 18
Coggins v. City of Asheville, 278 N. C. 428, 180 S. E. 2d 149 (1971)	15
Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33, 39 U. S. L. W. 4447 (1971)	4 22, 23
Dilday v. Board of Education, 267 N. C. 438, 148 S. E. 2d 513, 149 S. E. 2d 345 (1966)	12, 15
Griffin v. County School Board of Prince Edward County, Virginia, 377 U. S. 281, 84 S. Ct. 1226 (1964)	26

TABLE OF CASES AND STATUTES Cont'd.

	Pages
Harris v. Board of Commissioners of Washington County, 274 N. C. 343, 163 S. E. 2d 387 (1968)	15
Rider v. Lenoir County, 236 N. C. 620, 73 S. E. 2d 913 (1952)	15
Scott, Catherine, et al. v. Winston-Salem/Forsyth County Board of Education, et al., 444 F. 2d 99 (4th Cir. 1971), Petition for Certiorari denied, ___ U. S. ___ (1971)	5, 8, 9 21, 22
Scott, Catherine, et al. v. Winston-Salem/Forsyth County Board of Education, et al., 317 F. Supp. 453 (M. D. N. C. 1970)	5
Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 39 U. S. L. W. 4437 (1971)	4, 22 23, 25
Sykes v. Belk, 278 N. C. 106, 179 S. E. 2d 439 (1971)	15, 21

TABLE OF CASES AND STATUTES Con'd.

STATUTES — Pages

North Carolina General Statutes:

N. C. G. S. 153-77 (1927) . . . 18

N. C. G. S. 153-79 (1927) . . . 19

RULES OF COURT

United States Supreme Court:

Rule 19 . . . . . 5, 6, 10

Rule 24 . . . . . 1, 2

Rule 33 30

SUPREME COURT OF THE UNITED STATES

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RESPONSE OF FORSYTH COUNTY, NORTH CAROLINA, BOARD OF COMMISSIONERS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The respondent, Board of County Commissioners of Forsyth County, North Carolina, files this Response or opposing brief pursuant to Rule 24 of the Supreme Court Rules in opposition to the Petition docketed with this Court on December 3, 1971. The plaintiffs below have

petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision of said Court entitled Harvey H. Allen and Simona A. Allen v. State Board of Education of North Carolina, et al., 447 F. 2d 960 (No. 71-1563, 4th Cir. 1971). The text of that Opinion is set forth as petitioners' "Exhibit A," Appendix, pp. 1 through 3. The purpose of this Response is to disclose to the Court, pursuant to Rule 24 of the Supreme Court Rules, why the cause should not be reviewed by this Court. In pertinent part, Rule 24 provides as follows:

> "1. Counsel for the respondent shall have thirty days ... after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. ..."

QUESTION PRESENTED FOR REVIEW

The sole question presented for review by this Court is whether or not the United States Court of Appeals for the Fourth Circuit, in its Opinion referred to infra, committed error in affirming the Order for Final Judgment (Petitioners' "Exhibit B," Appendix, pp. 4 and 5) and Final Judgment (Partial) (Petitioners' "Exhibit C," Appendix, pp. 5 and 6) holding that the Complaint in this action (Petition, pp. 22 through 29) presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968. Stated differently, the question posed for review is whether or not approval by the voters of a county on the question of granting authority to issue bonds for school purposes violates the Constitution of the United States, and more particularly the

due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (Petition, pp. 11 and 12).

The petitioners have attempted to interpose other issues before this Court which realistically are not present, basically relating to the operation of the Winston-Salem/Forsyth County, North Carolina, school system, and whether or not that system is currently being operated as a unitary system in conformance with Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 39 U. S. L. W. 4437 (1971), and Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33, 39 U. S. L. W. 4447 (1971). It is respectfully submitted that these issues are not before this Court, but are under the jurisdiction of the federal courts, in.

Catherine Scott, et al. v. Winston-Salem/ Forsyth County Board of Education, et al., 444 F. 2d 99 (4th Cir. 1971), Petition for Certiorari denied, ___ U. S. ___ (1971). The Scott case was originally decided as set forth in 317 F. Supp. 453 (M. D. N. C. 1970).

The purpose of this Response is to resolve the question as to whether this case should be reviewed by the Supreme Court in light of Rule 19 of the Supreme Court Rules and the considerations contained therein. Embraced in this consideration is the issue: Should the decision below that the Complaint does not affect the validity of a municipal or county school bond proposal, which only sets forth the general purposes for which school bonds may be issued without regard to construction plans, location, site, or any other aspects of the

improvements (see Respondent County's Exhibit 1, p.29), be reviewed by this Court as involving a substantial federal constitutional question?

For the reasons set forth herein below, it is respectfully submitted that this cause should not be reviewed by this Court, as there are no special and important reasons therefor in view of those considerations set forth in Rule 19, which provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b). Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF CASE

This action was instituted by the filing of the Complaint on March 26, 1970 (Plaintiffs' Petition, pp. 22 through 29). On March 18, 1971, the defendant, Winston-Salem/Forsyth County, North Carolina, Board of Education, filed a Motion for Final Summary Judgment (Petitioners' "Exhibit D," p. 7 of Appendix to Petition), praying that the District Court enter summary judgment that

the Complaint presents no claim that could affect the validity of the 24.8 million dollar bond issue passed by the voters of Forsyth County on March 16, 1968 (Respondent County's Exhibit 1, Appendix, p. 29). On May 6, 1971, the District Court entered Final Judgment (Partial), Petitioners' "Exhibit C," having theretofore ordered on April 20, 1971, that such Final Judgment be entered (Petitioners' "Exhibit B"). This case has not been heard on the merits, attributable to the fact that the Scott case, cited supra, preceded this case and involved substantially the same issues and had progressed to such a point that a hearing on the merits had basically been accomplished. In its per curiam Opinion in the Scott case, the Court of Appeals stated:

"... we remand to the respective district courts with instructions to receive from the respective school boards new plans which will give effect to Swann and Davis."

In October of 1971, this Court denied the School Board's Petition for Certiorari to review that decision of the Court of Appeals.

The Scott case is deemed pertinent to the matter under consideration, inasmuch as the history of that case would, in large measure, be repeated in the Allen case and involves substantially the same issues as present in the Scott case. As stated in the Court of Appeals Opinion in the Allen case (Petitioners' "Exhibit A"):

"This same school district is involved in another school desegregation case which was recently before this court. Scott v. Winston-Salem/Forsyth County Board of Education, 4 Cir., ___ F. 2d ___ (June 10, 1971). That case was remanded to the District Court for further proceedings for the final achievement of a unitary system. The Scott case

involves some of the issues remaining in this case."

(Emphasis added)

ARGUMENT

It is respectfully contended by the County that this is not an appropriate case for review by the Supreme Court, and that the Petition filed herein should be denied. Under Rule 19 of the Supreme Court Rules and those considerations referred to therein, the Court of Appeals has not rendered a decision in conflict with the decision of any other court of appeals on this same matter; the Opinion of the Court of Appeals was not decided in a way in conflict with applicable North Carolina law (in fact, the Opinion is fully in accord with the law of North Carolina, as will be shown herein below); the decision did not decide an important question of federal law, and that decision is in no manner in conflict

with applicable decisions of this Court. There was no departure from the accepted and usual course of judicial proceedings, the Court of Appeals simply having found that the Complaint in this cause presented no claim which could affect the validity of the school bond issue as authorized by the voters of Forsyth County, North Carolina (the issue submitted to the voters being attached to the Response as County Exhibit 1). As has been reiterated by the County throughout hearings of this case, the petitioners have confused the validity of the bonds themselves with the expenditure of proceeds, which may be derived from bond funds or any other source. In reality, there is no contention whatsoever as to the validity of the bond election, the procedures by which the election was held, or the legality of authorizing, by popular vote, the issuance of school bonds. The petitioners'

concern has continually been in regard to proceeds expended for school purposes, which may be derived from bond proceeds, tax funds, nontax funds, or from any other source of revenue available to government. As the validity of the bonds themselves is not in issue, this case does not present an appropriate matter for Supreme Court review.

Initially, for the benefit of the Court, the respective areas of responsibility for local school matters in North Carolina should be clarified. The case of Dilday v. Board of Education, 267 N.C. 438, 148 S. E. 2d 513, 149 S. E. 2d 345 (1966), states distinctly the relative responsibilities and duties of local county governing bodies and local boards of education:

> "Plaintiffs' second and third contentions require a consideration of the relative duties of county commissioners and county boards of education with reference to the public schools.

"The authority and duty to operate county schools is vested in the county board of education, which is required to provide adequate school buildings, suitably equipped. G. S. 115-35; G. S. 115-29. The board of education determines, in the first instance, what buildings require repairs, remodeling, or enlarging; whether new school houses are needed; and if so, where they shall be located. Such decisions are vested in the sound discretion of the board of education, and its actions with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. Feezor v. Siceloff, 232 N. C. 563, 61 S. E. 2d 714; Board of Education v. Lewis, 231 N. C. 661, 58 S. E. 2d 725; Waldrop v. Hodges, 230 N. C. 370, 53 S. E. 2d 263; Atkins v. McAden, 229 N. C. 752, 51 S. E. 2d 484.

"Each year the board of education surveys the needs of its school system with reference to buildings and equipment. By resolution it presents these needs, together with their costs, to the commissioners, who are 'given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped. ...' G. S. 115-129. It is the board of commissioners, therefore, which is charged with the duty of determining what expenditures shall be made for the erection, repairs, and equipment of school buildings in the county. Johnson v. Marrow, 228 N. C. 58, 44 S. E. 2d 468. However, as

pointed out in Atkins v. McAden, supra, the commissioners' control over the expenditure of funds for the erection, repair, and equipment of school buildings does not interfere with the exclusive control of the schools which is vested in the county board of education or in the trustees of administrative units. Having determined what expenditures are necessary and possible, and having provided the funds, the jurisdiction of the commissioners ends. The authority to execute the plans is in the board of education. Parker v. Anson County, 237 N. C. 78, 74 S. E. 2d 338."

(Emphasis added)

267 N. C. 438, 448 and 449

Petitioners speak of the adoption of a plan for the expenditure of the bond proceeds, and contend that schools may be identified in the local school system by race, and that school building programs must eliminate a dual school system. These allegations evidence the confusion of the petitioners as regards a bond issue from which proceeds might be derived for school purposes and the expenditure of the proceeds themselves. This distinction has

been recognized in North Carolina continually, said distinction being not a subterfuge, but one of reality, as demonstrated by the relative responsibilities of local governing bodies and local school boards, set forth in the Dilday case, supra. See Harris v. Board of Commissioners of Washington County, 274 N. C. 343, 163 S. E. 2d 387 (1968); Atkins v. McAden, 229 N. C. 752, 51 S. E. 2d 484 (1949); Sykes v. Belk, 278 N. C. 106, 179 S. E. 2d 439 (1971); Coggins v. City of Asheville, 278 N. C. 428, 180 S. E. 2d 149 (1971); and Rider v. Lenoir County, 236 N. C. 620, 73 S. E. 2d 913 (1952). The foregoing cases clearly demonstrate the legality of funding school operations by the authorization for and issuance of bonds. Respondent's Exhibit 1, the

bond proposal voted upon by the residents of the County, on its face, clearly indicates only approval for erecting school buildings and other facilities, including remodeling and additional construction, without specifying location, situs, or any other aspects which the petitioners attempt to raise in the Petition. Clearly, the bond issue is valid on its face.

Of paramount importance in the consideration by this Court of the Petition is the fact that there is no federal question raised in regard to the validity of the bond proposal itself. The petitioners' questions relate to issues which may be raised in the future in this case in regard to the expenditure of proceeds - but proceeds may come from many varied sources, and the source of the proceeds

bears no relevance to questions which might be related to the expenditure of proceeds. This valid distinction was recognized by the Court of Appeals, wherein that Court stated in its Opinion, which is the subject of this Petition:

> "The relief sought stems entirely from an expression of concern that the proceeds of the bond issue might be spent in such a way as to encourage a segregated school system.
>
> "The District Court granted a partial summary judgment, ... in which it was held that any present or future controversy which may exist over the expenditure of the proceeds of the school bond issue does not affect their validity, ..."
>
> (Emphasis added)

Thus, the Court of Appeals recognized the valid distinction existing between the bond issue itself and proceeds or expenditures which might be derived from that bond issue. That determination did not involve a question

of federal constitutional law, much less a substantial one, but in reality only decided the issue consistent with the law of North Carolina. In the bond proposal or issue in question, as set forth in County's Exhibit 1, there is no detail concerning estimates as to particular projects or a description of the projects themselves. Under North Carolina law, this is not necessary. As stated in the Atkins case, cited supra, at page 755:

> "The detailed estimates given and the projects described in the bond order were not essential to the validity of the order, and it is so provided in the statute."

Section 77 of Chapter 153 of the North Carolina General Statutes, entitled:

> "Purposes for which bonds may be issued and taxes levied,"

provides in pertinent part:

> "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, ... :
>
> "(1) Erection and purchase of school houses, school garages, physical education and vocational education buildings, teacherages, lunchrooms, and other similar school plant facilities."

G. S. 153-77 (1927)

Section 79 of Chapter 153 of the North Carolina General Statutes (1927) provides as follows:

> "§ 153-79. Order need not specify details of purpose.— In stating the purpose of a bond issue, an order need not specify the location of any improvement or property, or the material of construction."

Petitioners, as stated hereinbefore, make no contentions or allegations in regard to the validity of the bond order as set forth as Exhibit 1 herein,

the election procedures, or the procedures by which the bonds would be issued, it being clear that their concern is in regard to the expenditure of funds rather than the validity of the bonds themselves. The law of North Carolina requires no detail of the purpose or locations of sites for school purposes; and the question before this Court, the validity of the bond order itself (as opposed to the questions raised by the petitioners relating to funds), does not involve a federal question, is a question of state law, and was properly decided by the Court of Appeals. The consideration of the question before this Court as to the validity of the bond proposal based upon the Complaint does not involve resolving a federal question. The following offers an understanding of this distinction between

the bonds and the proceeds (quoting from the Sykes case, supra):

> "Plaintiffs do not attack the election for failure to meet procedural requirements; neither do they contend that the ordinance, the notice of election, the ballot, or any formal action of the City Council invalidated the election."
>
> 179 S. E. 2d 439, 444

Of perhaps equal, if not more significance on the question of whether or not this Court should grant the Petition is the Scott case, cited supra. As stated by the Court of Appeals in its Allen Opinion, which is not disputed by the petitioners, the Scott case involves some of the issues which remain in this case. In fact, those issues which are raised by the petitioners before this Court are issues previously heard on the merits in the Scott case before the District Court (Middle District, North

Carolina). The Court of Appeals remanded to the District Court with instructions to receive new plans from the School Board to give effect to Swann and Davis. The Petition of the School Board for review by this Court was denied (____ U. S. ____, October, 1971). If this Court did not elect to review the Scott decision and the issues therein, it is difficult to conceive why this case should be accorded that privilege, especially in view of the fact that the Allen case has not been heard on the merits, and the questions presented by the Petition do not actually deal with the validity of the bonds, but deal with the operation of the local school system, matters over which the Scott case assumed

jurisdiction and which were fully litigated before the District Court and the Court of Appeals. The School Board is currently operating under a pupil assignment plan for the school year 1971-1972, approved and ordered implemented by the District Court, under mandate from the Court of Appeals to adopt a new plan in compliance with Swann and Davis.

SUMMARY

The Petition only presents the question of whether the Complaint in this action affects the validity of the bonds referred to and discussed herein. There is no federal constitutional question involved. To the extent any such question is involved, it could only relate to the expenditure of funds for school purposes, as

opposed to the means by which funds may be generated or raised. None of the bonds in question have been issued, and no revenues therefrom have been raised. Consequently, no potential funds therefrom have been encumbered or appropriated for school purposes. To say the least, the petitioners' action is premature. The only question which could be resolved by this Court if the Petition were granted would be whether or not bonds may be approved by the voters of a particular governmental unit as a means of raising revenues for local schools. Stated differently, the question would be: By authorization of and approval in a vote by the citizens of a county on the question of whether or not bonds may be issued

for school purposes, how has there been a constitutional violation? As stated by this Court in the Swann case:

> "One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, ..."

39 U. S. L. W. 4437, 4444

In referring to the power which the petitioners herein seek to invoke through this Court, Swann states:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. ..."

39 U. S. L. W. 4437, 4441

The authorization for a local governing body to raise revenues for school purposes by the issuance of bonds does not involve a constitutional violation. A "right and a violation" (Swann, p. 4441) have not been shown.

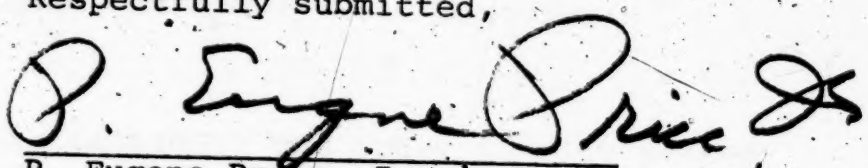
The case of Griffin v. County School Board of Prince Edward County, Virginia, 377 U. S. 281, 84 S. Ct. 1226 (1964), bears no relevance to the situation existing here. There the public schools of Prince Edward County were closed while public schools in all other counties in Virginia were being maintained. The Board of Supervisors in that county was expending funds to assist private schools which excluded Negroes from admission. Schools for whites were being operated with government funds but not for blacks, and the Court found that the law of Virginia treated the school children of that county different from the way it treated the school children of other Virginia counties. Only segregated private schools were in operation, supported by local and state funds. Clearly, the Griffin case has no application

to the case at hand or the issue of whether or not this Court should grant certiorari.

The only question presented by this Petition is the validity of the school bonds. The bonds themselves bear no relevance to questions involved in school desegregation cases, as they only represent a potential source of funds. There is no constitutional question involved or raised, much less a substantial one. For the reasons stated herein, it is respectfully requested that the Court deny the petitioners' request for a writ of certiorari to the United States

Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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RESPONDENT COUNTY'S EXHIBIT 1

School Bond Proposal or Issue Approved by the Voters of Forsyth County, North Carolina, on March 16, 1968, at a Duly Held Election

(FOR) (AGAINST) the order finally passed on January 29, 1968, authorizing the County of Forsyth, North Carolina, to contract a debt, in addition to any and all other debt which said County may now or hereafter have power or authority to contract, and in evidence thereof to issue School Building Bonds in an aggregate principal amount not exceeding $24,800,000 for the purpose of providing funds, with any other available funds, for erecting additional school buildings and other school plant facilities, remodeling, enlarging and reconstructing existing school buildings and other school plant facilities, and acquiring necessary land and equipment therefor, in order to provide additional school facilities in the County of Forsyth to maintain the six-months' school term in said County as required by Section 3 of Article IX of the Constitution, and a tax therefor.

CERTIFICATE OF SERVICE

I, P. EUGENE PRICE, JR., attorney at law and counsel for the respondent, Board of County Commissioners of Forsyth County, North Carolina, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that pursuant to Rule 33 of the Supreme Court Rules, I did serve on each of the parties to this cause, through their counsel, three (3) copies of the foregoing Response of Forsyth County, North Carolina, Board of Commissioners to Petition for Writ of Certiorari to United States Court of Appeals for the Fourth Circuit, by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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This the 31 day of December,
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